IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

IN RE: NORTEL NETWORKS, INC., et al.	:	BANKRUPTCY ACTION
Debtors.	:	NO. 09-10138-KG
SNMP RESEARCH INTERNATIONAL, INC., and SNMP RESEARCH, INC.,	:	CIVIL ACTION
Plaintiffs,	:	
v	:	
NORTEL NETWORKS, INC., et al., and AVAYA, INC.,	:	
Defendants.	:	NO. 15-449-LPS

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Wilmington, Delaware
Thursday, August 27, 2015
Oral Argument Hearing

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BEFORE: HONORABLE **LEONARD P. STARK**, Chief Judge

APPEARANCES:

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and

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P R O C E E D I N G S

(REPORTER'S NOTE: The following hearing was held in open court, beginning at 10:09 a.m.)

THE COURT: Good morning.

(The attorneys respond, "Good morning, Your Honor.")

THE COURT: I'll have you put your appearances on the record for me, please.

MR. PERNICK: Good morning, Your Honor.

THE COURT: Good morning.

MR. PERNICK: Norman Pernick from Coal Schotz. Good morning. I just wanted to take a quick minute and introduce our side of the table.

I have with me Dr. Jeffrey Casey, the owner of SNMP Research.

THE COURT: Welcome.

MR. PERNICK: My co-counsel, Richard Busch from King & Ballow.

THE COURT: Good morning.

MR. PERNICK: And also my colleagues, David Dean and Jonathan Grasso, also from Cole Schotz.

THE COURT: Thank you. Welcome to all of you.

MR. ABBOTT: Your Honor, maybe I will do the same thing, if I may.

THE COURT: That would about helpful. Thank you.

MR. ABBOTT: Your Honor, Derek Abbott from Morris Nichols for the Nortel U.S. debtors. Your Honor, making the argument today will be Matt Gurgel from Cleary

Gottlieb. Lisa Schweitzer, also from Cleary Gottlieb, who is seated next to him; my colleague, Andrew Remming from Morris Nichols; and Danni Byam also from Cleary as well.

THE COURT: Welcome to all of you as well.

MR. SULLIVAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. SULLIVAN: Bill Sullivan of Sullivan Hazeltine Allinson of on behalf of Avaya Inc. With me today is Barbra Parlin, from the firm of Holland & Knight.

MS. PARLIN: Good morning.

MR. SULLIVAN: Mr. Christopher Scott, also from the firm of Holland & Knight.

MR. SCOTT: Good morning.

THE COURT: Welcome to all of you. So we're here for argument on the motion to withdraw the reference.

We'll hear from the moving party first.

MR. DEAN: Good morning, Your Honor. David Dean of Cole Schotz on behalf of SNMP Research Inc. and SNMP Research International Inc.

We're here today on our motion to withdraw the reference to the adversary proceeding that we commenced in the Bankruptcy Court. The original adversary proceeding as it was originally filed was filed against the U.S. Nortel debtors, the objecting parties, the U.S. Nortel Canadian debtors affiliates, and certain nondebtor purchasers of

Nortel assets in their bankruptcy cases, including, but not limited to, Avaya Inc.

Our currently known claims against all of the asset buyers except for Avaya Inc. have been resolved. They're no longer parties to this proceeding. And the Canada Insolvency Court ordered in February or March that the claims against the Canadian debtors have to proceed in a separate forum in the Canadian court.

So the current defendants in this lawsuit are the U.S. Nortel debtors who are objecting to the motion, Avaya who has now consented to the motion, and the claims in those occasion cases against those defendants in the second amended complaint, Your Honor, are for copyright infringement under the copyright act, misappropriation of trade secrets under the Delaware statute, and breach of the contract against both sets of defendants.

Now, the crux of the lawsuit against the U.S. debtors is twofold.

First, we alleged that while operating postbankruptcy, the U.S. debtors improperly used our software outside the scope of the license agreement that we have with Nortel. We allege that they did this by using our software in unlicensed products and also by allowing Nortel to use software and these entities specific to Nortel use our software when they were specifically not allowed to

do so.

The second primary theory against the debtors in the case is that in connection with the sale of their assets through the business-line sales in the bankruptcy cases, we believe that even though they were prohibited from doing so under the sale orders and the Bankruptcy Code, Nortel transferred improperly our source code and our software to various asset buyers, including, but not limited, to Avaya. And we believe that that conduct constitutes a violation of the Copyright Act, Delaware trade secret laws, and the license agreement.

Now, as to Avaya, SNMP Research alleges that Avaya openly and notoriously uses our software in products without a license and with no authority to do so. And we also assert a separate claim against the U.S. debtors for contributory infringement in connection with Avaya's underlying infringement.

So those are the primary claims and theories in the case.

With respect to the damages, we think that the damages in this case are substantial, Your Honor. They include, but are not limited to, profit damages under the Copyright Act, and while we don't know at this point, because our expert reports have not yet been completed, the exact products, transferred value of those products, and

the value of our software imbedded in those products, we believe based on currently available information that we may be due $100 million or more from the U.S. debtors just for the transfer claim from the profit damages, and that we may be entitled to $100 million or more from Avaya due to the post-transfer infringement of which we think the debtors are also contributorily liable.

The motion to withdraw the reference before the Court today was filed on March 17th. We filed that with an accompanying motion required by the local bankruptcy rules for determination of the claims against Avaya are not within the purview of the Bankruptcy Court to enter final orders or judgment.

We had a hearing in front of Judge Gross on this motion after the briefing was completed, and Judge Gross issued a written decision confirming our theory and finding that he lacks the final adjudicatory authority with respect to the claims against Avaya.

THE COURT: So there is now no longer any confusion on that point; correct?

MR. DEAN: That is correct. There is no longer any confusion. That is a definitive ruling.

But in so doing, Your Honor, I think it is notable for purposes of today to mention that the Court found that SNMP Research did not impliedly consent to the

entry of these final judgment of order against Avaya through the timing of the motions to withdraw the reference or by commencing the lawsuit in the Bankruptcy Court in the first place. Judge Gross was also hesitant, Your Honor, to find implied consent based on our assertion of our jury trial rights against Avaya.

So not only does Judge Gross's decision as you mentioned definitively answer the question of the Court's final adjudicatory authority over the claims against Avaya, it also we believe puts the timeliness and jury trial waiver issue that are before the Court today in the proper context in our view.

So with that background, Your Honor, this brings us to the present motion. I think it probably makes sense from the onset for me to give the Court a roadmap of where I think the primary issues are and where my argument is going to go today.

I'm going to first address the threshold issue of timeliness.

Second, I'm going to give the Court three separate and independent reasons why cause exists to withdraw the reference under the statute and these are:

One, our jury trials rights against Avaya.

Two, the Third Circuit's factors in the *Pruitt* case constitute separate cause and independent cause to

withdraw the reference not just as to the claims against Avaya but also as to the claims against the Nortel debtors.

And, three, Your Honor, mandatory withdrawal of the reference is required in any event because this case involves substantial and material consideration of a non-bankruptcy federal statute and, in particular, the Copyright Act.

Finally, I'm going to address why we believe it's appropriate under the circumstances of this case to withdraw the reference immediately as opposed to waiting to withdraw the reference until trial.

With that background, Your Honor, starting with the issue of timeliness.

Avaya directly challenged timing but it is no longer objecting to the motion. And for their part, the debtors indirectly challenged timeliness in the context of their implied consent argument which is no longer before the Court, and it is moot in light of Judge Gross's decision.

I was actually happy that the Court asked for supplemental letters when the Avaya stipulation was filed because I thought it would be an opportunity to try to narrow the issues today because I do not believe that timing, timeliness or jury trial waiver, waiver issues should be before the Court today given Judge Gross's ruling

and Avaya's agreement to walk away from the objection.

So the debtors, in their response, in their letters to the Court, would not concede these points even though I think they must. So I'm going to address them now.

Your Honor, even when Avaya was an objecting party and was challenging timeliness, the Bankruptcy Court in its decision refused to imply consent based on the timing of the motion given the stage of the proceeding, discovery hadn't even commenced at the time the motion was filed, and the various stays and extensions that were given to the various parties in the case.

Now, we don't think that the debtors should even be permitted to challenge timing to the extent that they're doing so. They expressly agree in the letter agreement that we discuss in our opening brief to stay the case from the filing of the lawsuit until March 4th, 2015 when the Canadian Court decided that the Canadian claims must proceed in Canada. The motion to withdraw the reference was filed less than two weeks after that decision.

The debtors also agreed in that letter agreement not to object to any motions to withdraw the reference on timeliness grounds related to the mediation that the parties undertook which was the entire purpose of the letter agreement in the first place.

So we believe that the letter agreement, Your Honor, should be a complete bar to any timeliness challenge on the debtors' part; but even if the debtors could manufacture any challenge to timeliness, we think the Court should nonetheless hold, as Judge Gross held in his opinion, that the motion was timely given the stays of the case, the various extensions that were given, and the complete lack of any prejudice which the debtors required to show on a timeliness analysis because they were the ones who agreed to a stay which was the entire reason why we were prevented from filing the motion to withdraw until the Canadian Court issued its decision.

THE COURT: Now, is all of what you said, does that go to the timeliness of your motion to withdraw your adversary proceeding with respect to the debtors or does it also go to the motion to withdraw with respect to Avaya?

MR. DEAN: Well, Avaya was not a party to the letter agreement, so we did not have an agreement with Avaya that Avaya would waive the timeliness. So Avaya independently was challenging timeliness with respect to their claims. But the debtors, I think it goes directly to the debtors' claims because the debtors are barred from challenging timeliness.

The letter agreement doesn't specifically say that they won't challenge timeliness as to the debtors or as to

Avaya. It just says they won't challenge the timeliness of any motion to withdraw the reference. So it's not specific as to the claims against the debtors versus the claims against any non-debtors, including Avaya.

THE COURT: So even if the debtors were willing to concede that they don't have a timeliness argument, a meritorious one with respect to themselves but they think Avaya does and maybe Avaya doesn't want to raise it but the debtors do on behalf of Avaya, your view is the letter agreement precludes the debtors from making that argument?

MR. DEAN: That's the way I interpret the letter agreement, Your Honor.

THE COURT: Okay.

MR. DEAN: And just, lastly, even if they could make the argument, we think that it should be rejected for the reasons stated in Judge Gross's decision and in our papers.

THE COURT: Did Judge Gross indicate that he thought you brought the motion to withdraw the reference with respect to Avaya at the first reasonable opportunity you had to do it?

MR. DEAN: What Judge Gross said in his opinion, he didn't decide the timeliness issue because it was not an issue that was before him. But the crux of what he said is that timeliness does not mean quick. And even when Avaya

was making the challenge and before they withdrew their objection, Judge Gross said that he thought this Court very well might find that the motion was timely based on the various extensions and the stay of the case and the early nature of the case. That is what Judge Gross said about it.

THE COURT: Do you agree that if I reach the timeliness issue, the burden is on you to show that you moved to withdraw the reference at the first reasonable opportunity after you had notice of the grounds for removal?

MR. DEAN: Yes.

THE COURT: How could I find that with respect to Avaya, you have done that?

MR. DEAN: Well, because we could not, as we argued in our motion and our reply, we -- or in our reply, we could not have withdrawn the reference of this case. The whole point is to have one adjudication of the claims. We were prohibited from filing a motion to withdraw the reference of the entire case in light of the stay of the case. That is one reason, Your Honor.

The second reason is that Avaya has to show that that they were prejudiced in a timely analysis. And I believe that is their burden. And Avaya sat idly by, not raising any issues throughout case and was just as happy to sit by while we mediated with the debtors.

No. 3, Your Honor, Avaya came to us when the

first amended complaint was filed and asked us if they could have an extension to respond to it and also wanted to be part of the stay of the case. So in February of 2014, Judge Gross entered an order on consent of all the parties in which Avaya was given an extension, an indefinite extension to respond to the complaint until the Canadian Court decided the issue of the motion for relief from stay that we have before the Canadian Court and also stayed all the claims against Avaya pending that ruling. So because Avaya entered into that agreement with us and got an extension and agreed to the stay of the case, we don't think they can challenge it either even though they weren't a party to the specific letter agreement.

Now, if the Court does find that the motion was timely filed, Your Honor, for the reference to be withdrawn, the Court must either find cause under the first sentence of 28 U.S.C. 157(d) or find that the withdrawal is mandatory under the second sentence of the statute.

The law, Your Honor, is clear that cause exists in the first sentence of Section 157(d) and that it is automatic if the preservation of jury trial rights are stayed.

This Court, more than once, has unequivocally adopted this view in the *NDEP* case and the *Uni Marts* case cited at pages 12 and 13 of our reply brief.

Now, as I mentioned, like the timeliness issue,

the jury trial waiver issue was one we thought was unique to Avaya and one we would not have to argue about today. But despite the debtors' insistence that the argument remained viable even though the jury trial right is only directed to Avaya and Avaya has agreed to withdraw its objection, the Third Circuit's decision in the *Billing* case discussed in our reply brief confirms that a party does not waive a jury trial right simply by commencing lawsuit in Bankruptcy Court and that is what the debtors have argued.

The claimed subject to the jury trial waiver under *Billing* must invoke the claim allowance process against the debtors' estate. There is no dispute here that the claims against Avaya do not invoke that claims allowance process. And despite all the briefing in this matter and the fact we raised the *Billing* decision in front of Judge Gross and in front of Your Honor, the debtors have never addressed the *Billing* case, they have never even acknowledged its existence, and they have not addressed Judge Gross's opinion which acknowledges the applicability of the *Billing* case to the jury trial waiver issue and under the facts of this case.

So with respect to the jury trial waiver issue, Your Honor, like Judge Gross also suggested but did not directly hold because the issue was not before him, we respectfully submit that this Court show hold that the filing of a lawsuit in Bankruptcy Court in the first instance

in which we directly demanded a jury trial claim in every version of the complaint as Judge Gross noted cannot constitute a jury trial waiver against Avaya under the Third Circuit standard in the *Billing* case.

So in addition to the jury trial right, which, as I noted, makes withdrawing the reference against Avaya automatic --

THE COURT: Well, let me --

MR. DEAN: Oh, sure.

THE COURT: I want to make sure I understand that. Let's assume we agree with you that you haven't waived your right to a jury trial. When you say, therefore, withdrawal of the reference is automatic, what exactly do you mean by that? I have to grant your motion and have to withdraw the reference in full now?

MR. DEAN: As to Avaya, only, and before trial. I should have clarified that.

THE COURT: Okay.

MR. DEAN: Not, it doesn't require you to do it before trial, and it doesn't require you to do it as to the debtors. But I'm going to get to that issue in a moment.

THE COURT: Right. Your fourth issue is why I should do it now, but even if I agree with you that you have the right to the jury trial versus Avaya, that doesn't necessarily mean I need to withdraw the reference even with

respect to Avaya today.

MR. DEAN: Not in and of itself, correct.

THE COURT: Okay.

MR. DEAN: Now, the next issue I think is that we think that the balance of the Third Circuit's factors in the *Pruitt* case, which are the factors that deal with permissive withdrawal of the reference which focus largely on judicial efficiency and also invoke principles of forum shopping or prohibiting forum shopping, favor withdrawal of the reference of the entire case, not just the claims against Avaya.

In fact, Your Honor, I just want to note that the debtors, and Avaya as well for that matter, didn't even advocate for a partial withdrawal of the reference to the extent that the Avaya claims are subject to withdrawal in their brief. They didn't do it until their August 24th letter to the Court in response to the Court's Order, and they didn't do it until after they lost the Bankruptcy Court hearing and Avaya agreed to walk away because I think, my analysis of this is that's really all they're left with is this argument as to why a partial withdrawal of the reference is appropriate.

And I know the motion focuses on the *Pruitt* factors in the context of withdrawing the entire case, but what I really want to do is hone in on the reasons today,

because they have not raised this issue in their letter as to why partial withdrawal of the reference makes no sense. And I'm going to give the Court several reasons as to why it doesn't.

THE COURT: And that is fine. You have already made the point that the whole point here I think you said is to have one adjudication of the claims. And certainly one would presume that it is best that everything go forward, either here or with Judge Gross, but that just raises for me a question of why should it be me as opposed to Judge Gross. So I do want to make sure you focus at some point on that, because if you persuade me that partial doesn't make sense for anyone, why should it be me as opposed to him?

MR. DEAN: Well, and I think I'll discuss those in the context of these factors, too. I think it will answer that question as well.

Because the first reason why the reference of the entire case shouldn't be withdrawn is because this is the only court that can enter final orders with respect to all claims in the case, and this was definitely decided by Judge Gross's Order.

Now, the debtors attempt to mitigate this fact and they do it in their letter and they do it in their brief by trying to explain that there are differences in the claims against Nortel and Avaya, that the infringement

claims against Nortel relate to the pre-sale and the sale period and that the infringement claims against Avaya relate to the post-sale period. That is true. We don't dispute that.

But the truth is that this case, and these claims against Avaya and Nortel, relates to the same Nortel products, the same sale transaction, the same technology, the same software, the same SNMP copyrights, and the same exact legal causes of action against both sets of defendants.

So we submit that taking up the Avaya claims, which we think you have to do because of the jury trial right, because the Bankruptcy Court can't conduct a jury trial, and keeping the debtors claims in Bankruptcy Court, which is what they're advocating to the extent you do that, would been entirely inefficient and uphill, and it could also lead to inconsistent findings. I'll give the Court a couple examples how we think this could happen.

No. 1, we think that we're going to have to show as part of our burden that our products, I'm sorry, that the products transferred from Nortel to Avaya have our software embedded in it. That's a common issue to both of these claims, and not only the transfer claim damages and the profit damages against the debtor but also the post-sale claims against Avaya. That is a fundamental technical issue that is going to require a lot of expert analysis

and testimony that will be the exact subject of both sets of claims against both sets of defendants.

The other issue, Your Honor, is that we're going to have to show that Nortel actually infringed on our technology and our copyrights by transferring our source code and our software to Nortel -- I mean to Avaya. That is also going to be relevant to both sets of infringement claims. We're going to have to show that Avaya actually received the software in order to show that Avaya is continuing to infringe on our software.

So these are two common issues that if you split this case up could create inconsistent findings if this Court were to take the Avaya case and the Bankruptcy Court were to keep the claims against the debtors, which is exactly what the debtors are advocating here in their August 24th letter should happen.

So the most important issue, though, and this is the one that really would make partial withdrawal least palatable. And this one is that we are alleging that Avaya infringed post-sale, but we also have a separate claim against the debtors for contributory infringement based on Avaya's underlying infringement. In other words, if Nortel didn't transfer the software to Avaya, then Avaya could not have infringed on our copyrights.

So it would make no sense to try the

infringement claim against Avaya in this court and then try the contributory infringement claim against the debtors in another court, and even if the Court were to find that were appropriate, the trial on the Avaya underlying infringement claim would have to occur in this court first before the case in the Bankruptcy Court could even be tried, because you have to try the underlying infringement claim against Avaya before you can even get to the contributory infringement claim because that is an element.

The second reason why partial withdrawal makes no sense, Your Honor, is because as I mentioned before, we had a jury trial right against Avaya. The Bankruptcy Court will not -- theoretically it can but I think it ever has conducted a jury trial. So it has to be this court if the Court finds that we can have a jury trial. And the only issue is whether we should have two trials or one.

Now, the debtors -- I want to mention, this seems to be a really simple proposition to me, but I want to address one point that the debtors raise in their August 24 letter. They incorrectly argue and they make the statement that the Bankruptcy Court can simply issue proposed findings of facts and conclusions of law with respect to the claims against Avaya.

This is simply not true. This may be true with respect to motions for summary judgment, dispositive

motions, but it certainly is not true with respect to a trial because the Bankruptcy Court will not conduct a jury trial in this case. So if they can't conduct a trial, then the Bankruptcy Court cannot issue proposed findings and conclusion after a trial that it can't conduct in the first place because of the jury trial right.

A couple more reasons why partial withdrawal of the reference makes no sense, Your Honor.

At bottom, and at its core, this is a copyright infringement case. This Court is one of the most experienced courts in the Country in dealing with intellectual property disputes. And I'll direct the Court to the *In Re: Bennett* case from Texas that we cited in our opening brief. It has a very good discussion of why a Bankruptcy Court should not try a copyright infringement case, and it makes sense in those type of cases to withdraw the reference for a District Court who has more, far more experience in dealing with these kind of issues.

THE COURT: Doesn't our Bankruptcy Court in particular have a great deal of experience with copyright cases?

MR. DEAN: Well, the debtors cited one case by Judge Gross that dealt with a copyright issue, but we don't think it is anything like this case, and we discuss in our reply brief it wasn't the kind of technical, highly

technical and sophisticated issue that we have here. The exact reasoning for that is set forth in their reply. They gave us one example of a copyright issue that Judge Gross decided, but I don't even think it's a close call that this Court has far more experience dealing with copyright issues than most courts in the country, especially in Bankruptcy Court, even though I think this Bankruptcy Court, it is possible they may have more copyright experience than other Bankruptcy Courts, but as compared to the District Courts of this Court, which I understand is the third, approximately the third most frequent IP litigation case court in the country, I just don't think it is even a close call.

Now, the debtors attack this argument by attempting to couch this case incorrectly as one that just simply arises under a dispute about the sale hearings and the bankruptcy sale orders. And Judge Gross is the one who signed the sale order, which, by the way, I'm sure he didn't draft. But he signed the sale orders, and he is the best one to interpret those orders. But this case has absolutely nothing to do with whether the sale orders were violated. It is abundantly clear that if they infringe, the sale orders are violated.

We're not asking for an interpretation of the sale orders. We are not asking for contempt under the sale order. We are not asking to undo the sale order. We are

alleging that what they did in transferring our source code outside the scope of the sale order is copyright infringement. It's as simple as that.

So their attempt to muddle this analysis by arguing that this is really about a sale order is nothing more than a red herring. This is nothing but a copyright infringement case at its core.

Now, the one other point I want to raise about this is in their letter, August 24. They really mischaracterize what happened in the Bankruptcy Court hearing by saying that in permitting the sales to go forward, the debtors say that the Bankruptcy Court expressly overruled the objections that SNMP Research has now recast as claims in their papers.

I have to tell you, this sentence in the order is by far the most puzzling of every argument and sentence contained in all of the briefs because what happened at these sale hearings is that all but the first one, which isn't even at issue in this case, SNMP objected to the sales to the extent that our software would be transferred as part of the sales.

The debtors got up in Court and acknowledge that that was not going to happen, told the Bankruptcy Judge that they weren't transferring our software as part of the sales, then agreed to put a carveout in the order specifically acknowledging that they wouldn't do it and now somehow argue

that we lost a sale objection because the sales got approved.

The Court may want to ask the debtors about this, I really can't explain, but I wanted to give my view of what happened at the sale hearing, how I don't understand that specific position.

But regardless of the debtors' characterization of what happened at the sale hearing, this is simply a copyright infringement case, and this Court is much more equipped to handle it, and it would be much more efficient for this Court to do so than the Bankruptcy Court.

Finally, on the efficiency, Your Honor. We don't think that withdrawing the reference in this case will have any effect on the administration of the bankruptcy case whatsoever for a couple reasons. The debtors can't even propose a Chapter 11 plan of liquidation until the allocation decision is decided.

As Your Honor probably knows, I'm sure you do, Judge Gross recently issued a decision denying a request for direct certification to the Third Circuit of the allocation decision. And that decision was based primarily on the fact that there were factual disputes in the allocation decision that underlie the appeal.

So, Your Honor has that appeal. It's been directed to mediation. We don't know how long that is going to take. But when you do decide the appeal, you may remand

it for further factual findings given these factual disputes that prohibited direct certification. You may affirm, you may deny, you may not. You may reverse. It may go to the Third Circuit. There is $7.2 billion involved in this case. It could go to the United States Supreme Court.

The point is it is pure speculation to suggest that this case would delay the administration of the bankruptcy case when nothing can happen with respect to full adjudication of this case until that allocation decision goes final.

Now, the other thing I will say about this, Your Honor, is that because you are going to be the one adjudicating this appeal, you are going to be hearing and learning about all of the various sales because that is what this appeal relates to. You are going to get knowledge through adjudicating this appeal that Judge Gross has, so any argument about Judge Gross's familiarity with the sale and the Nortel bankruptcy cases weighs against withdrawing the reference is mitigated by the fact that you are the Judge who will also be hearing that particular Nortel appeal.

THE COURT: So it may be vindicated, but if we take the perspective of today, certainly you won't deny Judge Gross is a whole lot more familiar with the bankruptcy and even with this adversary proceeding than I am.

MR. DEAN: He is. This adversary proceeding is

in its infancy, there hasn't been much that that has happened except for the one hearing I described in the entry of a scheduling order, so I'm not sure he is that familiar with it. But to the extent that Judge Gross's overall knowledge of the bankruptcy case is any factor in withdrawing the reference, the only thing I will say about that is the debtors cite cases that suggest that a Bankruptcy Judge's overall understanding of other issues in a bankruptcy case weigh in favor of withdrawing the reference. But what I will say, and we detailed this in our reply brief, many of those cases -- and I think most of those cases dealt with the issue where the entire bankruptcy case should be withdrawn, not some individualized copyright infringement case. And the other cases that they cite are cases where the Bankruptcy Court had other similar type of preference or fraudulent transfer type of litigations before it that are similar to what the subject litigation was.

There is nothing in the Bankruptcy Court that is even remotely close to this, so we don't think his overall knowledge of the bankruptcy case is really any indication of this specific unique individual copyright infringement case.

THE COURT: What about the complexity of the cross-border protocols in relationships here and the fact that there has been parallel proceedings in Canada and Judge Gross is intimately familiar with that, and while I may come

to be as you suggest, I'm not nearly where he is in terms of familiarity with all that. Isn't that a factor here?

MR. DEAN: Yes, I will address that. First of all, let me just say that while there has been coordination on the allocation, there was a joint trial in the allocation trial and there had been joint hearings on the various sale hearings, they weren't full blown evidentiary trials by any means. The only one I'm aware has been a full trial has been the allocation trial.

And in this case, I think I have to give the Court a little bit of background on this. I think it is really important. In February, the debtors and the Canadian debtors filed a motion together in each of their respective courts to issue a joint protocol for the purposes of this case. The point of it was to try to invoke some discovery process where everybody would be deposed in the same proceedings one time and there would be some sort of mishmash between the Canadian Rules of Procedure and the U.S. Rules of Procedure and they wanted to get that approved.

When the Canadian Court denied our motion, the Canadian debtors decided they were going to move forward with their litigation, notwithstanding what was going on in the United States, under the specific rules of Canada and under the specific substantive laws of Canada.

We, on the other hand, are behind the Canadian

debtors as far as when we started, and this case is now proceeding under the Federal Rules of Civil Procedure and Bankruptcy Rules and U.S. substantive law.

So there was no coordination whatsoever in this case. There has been no coordination. I'm not even sure there ever will be coordination between the Canadian court and the U.S. court in this particular litigation. The only communication that we are aware of is in February, in the February status conference that we had before Judge Gross, Judge Gross told us on record that Justice Newbould in Canada had called him and told him he was not going to permit the Canadian claims to proceed in the United States and he was going to keep them in Canada. Since then, everybody has proceeded on separate paths. And no one is suggesting, I don't think the debtors are even suggesting that they're going to put the pieces back together again at that point.

So I don't think that the potential cooperation in this particular litigation is relevant. But to the extent it is, I think the opportunity to have joint discovery has long passed because discovery is already proceeding on different paths.

And I'll give you an example. Mr. Case was deposed for three days a couple of weeks ago in the Canadian proceeding. U.S. counsel showed up but wanted me to agree that it was not -- it was without prejudice to their right to

take Jeff Case's deposition in the U.S. proceeding separately.

There is just no coordination here at all. So I don't think the Canadian proceeding or what is going on in the proceeding has anything to do with this case. There is going to have to be -- I mean Your Honor is going to have to choose, is there going to be two courts deciding these issues, one in Canada and one in the United States, or are there going to be three, two in the United States and one in Canada, the way we see it?

The last thing I want to raise about the *Pruitt* factors, Your Honor, is the forum shopping concept. The debtors accuse us of bringing this case in Bankruptcy Court and adding Avaya and others for the purpose of bootstrapping those non-debtor claims to basically drag the debtors up to District Court and have a trial in District Court against the debtors as opposed to the Bankruptcy Court.

I just think that this position is based on revisionist history, Your Honor. The reason why this case was commenced in Bankruptcy Court with the express intention to withdraw the reference as soon as we were able to do so and the stay was lifted was based on a letter agreement. It was an agreement we reached with the Canadian debtors and the U.S. debtors to be able to stop limitations from running, commence the lawsuit in one forum against the Canadian debtors, the U.S. debtors and non-debtors, try to have one

proceeding and move to withdraw the reference whenever the mediation ended, if it didn't settle. That was the primary reason why we commenced the lawsuit in Bankruptcy Court, because we would not have been able to get an agreement from the U.S. debtors and Canada to stop litigation and mediate if we proposed to institute the lawsuit in the first instance in the District Court.

Now, from a legal standpoint, I would also want to address one point that was raised in the August 24 letter by the debtors. They claim that they have some fundamental right to have a reference, to have the case adjudicated in Bankruptcy Court.

That is simply an incorrect statement of law, and I will tell the Court why. 28 U.S.C. 959(a) expressly permits a creditor to sue a debtor-in-possession for postpetition conduct in the course of the debtors' business without permission from the Bankruptcy Court in a U.S. District Court. And if that is done, it is, the statute is clear that the Bankruptcy Judge could stay it but that the jury trial claims, if the Bankruptcy Court does, are expressly preserved.

How does this relate to forum shopping? If our primary goal was to drag the U.S. debtors into this case, it would have been far easier for us to just use that statute and sue them in District Court. We would have had automatic

jury trial rights against them and Avaya, and there would have been no debate about partial withdrawal of the reference. So I just don't think that the debtors' forum shopping argument holds water.

THE COURT: You're saying under that statute, even though the case would be on my docket, the Bankruptcy Judge could stay it?

MR. DEAN: They could, but the statute says the jury trial rights against the debtors are expressly preserved if the Bankruptcy Judge does that. And the Bankruptcy Judge can't hold a jury trial, so it would ultimately end up back in your court anyway. We would have moved to withdraw the reference if the stay was imposed and the withdrawal as to the claims against Avaya and the debtors would have been automatically here with the jury trial right.

So if that was our primary goal, it would have been a lot easier to go in that direction than try to commence the suit in Bankruptcy Court and drag them up with Avaya. It makes no sense.

The last thing I will say about forum shopping is in any motion to withdraw the reference, there is a preference to litigate in District Court. This is a copyright case. We think that District Court is more capable for doing so. You can't find somebody is forum

shopping just because they exercise their express right under the statute to seek withdrawal of the reference. The withdrawal of reference statute would be meaningless. And they haven't showed anything more than that, so we don't think forum shopping is a relevant consideration given all these reasons at all.

Now, one thing I want to mention is that even if the *Pruitt* factors don't weigh in our favor for partial withdrawal, we think this is a case that warrants mandatory withdrawal of reference. For the reasons stated in the reply brief, I won't detail it, I'll just refer you to it, we don't think this case is one is one that -- we don't think the law requires issues of first impression to justify a mandatory withdrawal. Nobody debates that this is a very complicated copyright infringement case that is going to require a lot of expert and specific application of each product and each copyright provision of the Copyright Act.

We think that is enough to satisfy mandatory withdrawal of the reference. But to the extent it is not, the debtors recently, as we indicated in our August 19th letter to the Court, filed a motion to join the European group of debtors into this lawsuit. It's pending before Judge Gross. Now, it has not been decided yet, and it hasn't even been scheduled yet. It may be scheduled for September 8th but we're not sure yet.

And the debtors' motion raises various issues of first impression relating to the Practical Partner Doctrine that we detailed in the August 19th letter, and I will just refer the Court to that letter for those issues.

THE COURT: But the point there is if -- and we don't know if it will happen, but if the debtors' Rule 14 motion is granted and the European debtors come in or creditors, I think, then that would in your view increase your showing on whether there is a substantial, material --

MR. DEAN: Correct.

THE COURT: -- nonbankruptcy dispute.

MR. DEAN: That is correct.

THE COURT: You don't think you need that, but it would help.

MR. DEAN: We don't think we need that, but it would help to the extent the Court finds the issues of first impression are necessary.

One thing I will say is there could be an issue of first impression on the Practical Partner Doctrine, regardless whether it is denied, because one of the issues we identified was whether or not a party, a defendant must be a codefendant in the case to, in this case, make the debtor jointly and severally liable for the European debtors' portion of the profit from the sales. And whether the motion is granted or denied, if the motion is denied,

we're still going to try to get that, and it's an issue of first impression as to whether the practical partner needs to also be a defendant in the lawsuit.

And, No. 2, whether or not we can get damages against the debtors for profits attributable to the allocation to the European debtors when our claims, direct claims against the European debtors may be statute barred because we did not initially sue them, so those were two issues I think are relevant if, and whether, the motion is granted or denied.

THE COURT: You only have about five more minutes.

MR. DEAN: Sure.

THE COURT: I want to make sure that you explain to me why, even if I agree with all that you have said, why I should withdraw the reference in whole or in part now as opposed to as you say if these proceedings are in their infancy, letting them play out and letting you come back and seek to withdraw at a later date.

MR. DEAN: Sure. There are a couple reasons why. The first reason, Your Honor, is because when we filed this motion, we thought it's possible that Judge Andrews could ultimately get this case. I'm not sure what the Court will want to do with that, but Judge Andrews is overseeing two related litigations. One is our lawsuit against Avaya related to violation or infringement on the same exact

copyrights on the same exact software related to different Avaya products, products that Avaya distributed and sold before the Nortel purchase.

So there are a lot of common issues there. A lot of the experts may be the same, and we think that one single magistrate who I understand has held approximately 14 discovery hearings in this case, estimated to have taken about 24 hours total, it would be good if one magistrate oversaw all the discovery in this matter from the onset because of the overlap in the issues.

The other issue is that there is another case against Avaya's distributors and resellers which sue them for damages related to Avaya's underlying infringement in this case and in the case in front of Judge Andrews. That case is stayed pursuant to a stipulation pending the outcome of this case and the Judge Andrews case, that I just explained. Judge Andrews also has that case. So we thought it would be more appropriate for one judge and one magistrate to oversee discovery on all these matters at one time.

The other issue is that if you withdrew the reference now, the motion to join the EMEA debtors or the European debtors would be before you. You may want to decide that motion because it will really dictate how your trial is conducted and whether it is segregated and whether you are going to have a trial of the EMEA debtors' claims at

the same trial. And I just think that is a motion that is more appropriately decided by the Court that is ultimately going to try the case because the issue is going to be how is the trial conducted and what is the structure of the trial going to be.

So those are the reasons why we think it is appropriate to withdraw the reference.

I want to make one more point. This is one of the most important points I'm going to make today, is that Judge Gross has issued an order requiring a pretrial conference to occur in this case in December. He wants to try to expedite this case because he doesn't want delay. And we understand, and we agree.

We do not think the schedule is achievable. It is virtually impossible for us to do our expert reports and do the kind of work that is necessary in a complicated case like this before the deadlines that he set. We have an expert deadline in September. We're not even going to be close to be able to provide expert reports. In fact, we haven't even gotten the information that we needed from the debtors to do their reports, so we're going to ask him for an extension.

But as to why it relates to why the reference should be withdrawn now, I think the worst thing that could happen here is, and I have seen this done in other decisions

in motion to withdraw the reference, but it would be a catastrophe in this case if the Court just deferred everything and didn't make a decision as to whether we have a right to withdraw the reference before trial, because if the Court finds that you are going to withdraw the reference but you are going to kick it back to Judge Gross pending trial, we would respectfully ask that the Court, in its decision or some other way, give us some indication of when you might be able to have a trial in this case because that will dictate the schedule that Judge Gross decides.

There is no reason for us to have this December 28th pretrial conference if Your Honor may not be able to try this case for another year. So if you gave us a proposed month or some time frame for a trial, we could then back that date into a more reasonable schedule in front of Judge Gross if you find that we're entitled to a withdrawal of the reference but that you are going to hold the case in Bankruptcy Court until the trial commences.

THE COURT: Before we let you sit, the stipulation, which is unsigned at this point, indicates that you agree you won't seek to consolidate the claims you have against Avaya with those other cases. I think it must be the same Judge Andrews' cases you were mentioning before. Again, I haven't signed the stipulation, but do you agree that you are not going to be seeking to consolidate?

MR. DEAN: That was part of the agreement. We wouldn't have done that anyway because the case in front of Judge Andrews, expert reports have been submitted. That case is far ahead of this case, and there is a trial scheduled in May. So we don't think that this case is going to be trial ready anyway before that trial will be ready, and so we didn't have any problem accepting Avaya's request because we wouldn't have sought to consolidate the cases anyway based on where they are.

THE COURT: And if I sign the stipulation, does it have any impact, in your view, on whether I should grant or deny the motion?

MR. DEAN: Well, the only impact I think it has is the ones that I have already mentioned on the various issues that are at play. I don't think timeliness is an issue anymore. I don't think the jury trial waiver is at issue anymore.

I think that we would have won this hearing anyway, and I think that -- I don't want to speak for Avaya, but as to Avaya, their issues were virtually decided by the Bankruptcy Judge's decision. So we don't believe that Avaya's agreement to withdraw their objection is some great deal for us or anything. We thought that was going to happen anyway. So I don't think that the stipulation itself provides any impact. I think the Court would have easily

found that the jury trial right existed based on Judge Gross's decision and under the case law would have had withdrawn the reference anyway.

THE COURT: All right. We'll give you a few minutes for rebuttal even though I have used up all your time.

MR. DEAN: All right. No problem. Thank you, Your Honor. I appreciate the time.

THE COURT: We'll hear from the debtors.

Good morning.

MR. GURGEL: Thank you. Excuse me. Good morning, Your Honor. May it please the Court, Matthew Gurgel of Cleary Gottlieb Steen & Hamilton for the U.S. debtors.

Your Honor, obviously Mr. Dean covered a lot. So I'm going to try to give you a start by giving you an overview of what we think the key points are here. And I expect that I will address Mr. Dean's various points, though perhaps not in the same order that he chose to address them.

Just to kind of frame this case the way we see it, and it is kind of an overview what we think the main points are, I think it is helpful to kind of take the points in the way that SNMP has presented them.

SNMP is seeking, as you know, Your Honor, both mandatory and permissive withdrawal of this entire case.

And so as Mr. Dean said, not just the noncore claims against Avaya which SNMP claims it has a jury trial right, but the indisputably core claims against the debtors.

It is our position that there is no basis whatsoever in this case for mandatory withdrawal of the reference, as I will get to when I get into more detail. We don't think that SNMP has identified any material or substantial issue of federal nonbankruptcy law that requires Your Honor's expertise at the District Court level, much less any issue that would require an immediate withdrawal of this case. And as to permissive withdrawal, we also don't think that SNMP carried its burden to show that the factors from the textbook provisions were automatic.

I'll get into these in more detail again, but SNMP has acknowledged in its papers their primary claim in this case, at least with respect to the debtors, are the sale-based claims, which is that when the debtors undertook to transfer the debtors access to various purchases of the debtors' business line in the Bankruptcy Court in sales that were overseen and approved by the Bankruptcy Court that the debtors somehow harmed by and are liable to Avaya for that.

Mr. Dean addressed this or mentioned it, but SNMP had notice of those sales. It appeared in all of them but the first one, as Mr. Dean said. It filed objections, and those objections were ruled on by Judge Gross. We

certainly think that those objections are highly relevant to the Bankruptcy Court's expertise and the *Pruitt* factors as to whether this case should remain before Judge Gross.

The Bankruptcy Court also, as Your Honor indicated, has knowledge of the debtors' broader bankruptcy proceedings, and SNMP has tried to downplay the significance of that. But, again, there are two.

I think that Judge Gross's knowledge is highly relevant to the resolution of the claims, especially the core claims against the debtors. Judge Gross oversaw the sales not just with respect to the objections that SNMP filed, but all of the sales. And it is important to note here that the parties that remain here in this case are just the Nortel debtors and Avaya who is one of the buyers. SNMP is continuing to assert claims against the debtors not only for the sales to Avaya but for the sale of Genband, the sale to Ericsson, according to the complaint the sale to Sienna, and a number of other entities that purchased Nortel's business lines.

Judge Gross has substantial knowledge of those businesses not just from his involvement in the sale but from the fact that he presided over the allocation trial, the order of which is now on appeal before Your Honor. So he knows these businesses. He understands the debtors' assets. He knows, he understands the buyers.

The Bankruptcy Court also has a history of coordinating with the Canadian Court. And as Your Honor mentioned, the cross court protocol is in place. Again, I will get into this in more detail, but Mr. Dean suggested has been no coordination in this case, and we think that is flatly wrong.

Judge Gross, as he indicated I think in his February 27th decision when the parties had approached Judge Gross, the U.S./Canadian debtors, about implementing a schedule that would have things proceeding in parallel in the U.S. and Canada, Judge Gross noted his great concern that if the reference is withdrawn, the Canadian proceeding would get too far ahead of the proceeding in the United States, and that the net result wouldn't be good for the debtors, it wouldn't be good for the claimants or anyone else. Moreover, I think SNMP has downplayed the significance of the fact there has been actually extensive coordination if not between the courts on the issue of discovery but certainly between the parties.

Discovery that has already been produced in the Canadian proceedings has been provided to the U.S. debtors. If it has not already been provided to Avaya, I believe it will be provided. The U.S. debtors were afforded the opportunity to sit in on the deposition of Dr. Case.

And just I'll briefly mention the point that Mr.

Dean mentioned about the debtors not being willing to stipulate that that would be the only deposition of Dr. Case, which obviously we wanted to reserve our rights under the U.S. procedural rules, but to say that there is no coordination there I think doesn't fit the facts.

So for those reasons and others I will get into, Your Honor, we do think that for efficiency, uniform administration of the debtors' bankruptcy case, the reference should remain before Judge Gross here.

And because I represent the debtors, I'm going to focus primarily on the core claims against the debtors today. But we don't think that SNMP's reliance on the noncore claims against Avaya here or its purported jury trial right against Avaya changed the analysis.

I'll get into, Mr. Dean has indicated he doesn't think that we necessarily even have the ability to waive, to raise the jury trial right issue with the timing issue. But as I will elaborate, would you maintain SNMP waived its jury trial right both by filing its case in the Bankruptcy Court to begin with where no jury trial was available, particularly given SNMP has admitted it could have done otherwise, and that it filed its noncore claims to the Bankruptcy Court in order to maximize its chances to successfully withdraw its point of reference on the entire case? And that was in the hearing on the noncore motion

hearing before Judge Gross.

SNMP asked that if they were concerned about their jury trial rights, why not first file against non-debtors in the District Court and file against the debtors in the Bankruptcy Court?

And I think Mr. Dean at that hearing candidly acknowledged they didn't think that that would have worked. They weren't sure that their motion to withdraw would have succeeded if they had just been trying to withdraw core claims.

THE COURT: Well, why isn't it the answer that they thought that it's best that there be just one proceeding in front of one judge? And why isn't that correct that at the end of the day, I should decide ultimately whether I should handle the entirety of this adversary proceeding or Judge Gross should?

MR. GURGEL: Your Honor, as to the first question that was packed in there, I think that SNMP's approach proceeds from the idea that there is one perfect forum for this case and that it was entitled to a single forum to begin with. We think as an initial matter, it happens all the time that for various reasons, a party isn't able to sue all defendants in one forum, whether it's personal jurisdiction issues or whatever.

What we object to about their decision to proceed in the way that they did was this idea that, again,

I think proceeding from the false premise that there was one perfect forum here but they chose to file voluntarily their noncore claims in the Bankruptcy Court in hopes we really think of using those core claims as a lever to extract the core claims that go to much more than just the one sale against Avaya, but the debtors' sales to other buyers who are no longer in this case as well as claims of the debtors' own infringement which relate to proofs of claim, prepetition proofs of claim that are part of a separate contested matter before the Bankruptcy Court, a number of which Judge Gross has jurisdiction.

So I think, we think that essentially it was a false premise there. That they were entitled to go to one forum to begin with when they could have achieved that result differently and chose the method that they did in essence in order to cast their motion throughout the reference in a different light.

THE COURT: Why wouldn't they have just filed suit against you directly in this court under the statute that Mr. Dean referenced if that was their goal?

MR. GURGEL: Your Honor, that is a new argument that SNMP has raised today. My understanding is that all that Section 959 says is that the Bankruptcy Court's equitable power to hear those claims is preserved or is preserved to claims like that and that any jury trial rights

that SNMP would have had would not have been waived had they done that. But I think as Your Honor indicated, I think the Bankruptcy Court still could have essentially taken those proceedings, had they filed them in the District Court.

THE COURT: So you may be right that there is often not one perfect forum and parties are not always entitled to that. But where we are today is it seems to me I at least have the option of putting all of this case in one forum. It could be with me, it could be with Judge Gross. Why shouldn't I be narrowing the options I'm realistically considering to those two?

MR. GURGEL: Your Honor, I think that quantifying the efficiency gains and losses for I guess the three options that are really before Your Honor today, which are putting all the proceeding before Judge Gross, splitting them, or putting all the proceedings before Your Honor, are maybe a little difficult to measure.

I think most fundamentally, we disagree with SNMP's characterization that this case isn't about the sale orders, isn't about SNMP's objections to the sale which really are mirror images of the claims that they're now asserting.

We think that under the Third Circuit's decision in *Allegheny*, a Bankruptcy Court's claims or issues that implicate a Bankruptcy's Court's interpretation and power to

enforce its own sale orders clearly implicate Judge Gross's knowledge in this, and he is really the -- there is a paramount efficiency concern here. It's that Judge Gross be given the opportunity to rule on the implications of his own orders as well as his rulings on SNMP's objections.

I can't begin to recite the entire transfer to those hearings, but we fundamentally disagree with Mr. Dean's characterization. I know for a fact that there was colloquy between counsel for the debtors and the Court at one of the hearings that addressed an issued that is quite central to this case, which is that as a result of Judge Gross's orders, the various buyers were put on notice. The way Judge Gross dealt with the objections was by providing the sale orders that the Nortel and SNMP license agreement was not being assigned to the buyers.

So these buyers, who are all on notice that they're receiving SNMP's software in certain products, were informed by the Bankruptcy Court that you are getting the stuff, but you don't have a license to use it. So, in other words, if you want to use it, you are going to have to negotiate your own licenses. We think that is extremely significant to the defense of the U.S. debtors. SNMP is trying to blow by that as though it were a nonissue.

Mr. Dean also just said that they're not alleging any violations of the sale order. I'll find

the paragraph, but there is actually a paragraph in their complaint that alleges that in at least one case, the U.S. debtors violated their sale order by violating the Bankruptcy Court sale order. So that issue is right in SNMP's complaint, is front and center, and it is something for the Bankruptcy Court to consider.

Going back to the question about splitting, Your Honor. I think that our ultimate position is that, above all, it's imperative that the core claims against the debtors remain before Judge Gross and that Judge Gross can efficiently conduct a trial even if Your Honor were to decide to split things up.

One option even there would be to send pretrial issues back to the Bankruptcy Court.

But we think that the absolute worst result from the efficiency point of view is to pull these claims from the Court that is already essentially familiar with them, that is familiar with the sales, and that is actually familiar with other aspects of the debtors' adversary proceeding.

Mr. Dean's I think memory went back to earlier this year when we had a status conference on how to proceed with discovery. There were various points at which this case was stayed, a fair amount of them happened. One of the non-debtor defendants Radware filed a motion to dismiss.

There was full briefing on that in 2013, and Judge Gross ruled on the motion to dismiss and issued an order dismissing some of these claims against Radware. So to say Judge Gross doesn't have any worthwhile familiarity with this adversary proceeding, again, we think is just wrong.

Does that answer your question, Your Honor, or did I miss any part of it?

THE COURT: If it doesn't, I'll come back to it.

MR. GURGEL: Okay.

THE COURT: You may go on.

MR. GURGEL: Fair enough. I was talking -- I think I was starting to talk about the jury trial right, and the fact we think that SNMP -- and, again, I will get into more detail about that in a moment. But importantly even if Your Honor were to conclude even if SNMP has a jury trial right here, it wouldn't be a reason to grant permissive withdrawal at this juncture. It's far from certain that there would ever be a trial in this case.

And what we heard I think at the end of Mr. Dean's remarks was the word "trial" again and again and again. There is going to be a trial. A trial is going to have to be here. If there is going to be a trial, it will have to be here. As Mr. Dean himself acknowledged, Judge Gross could issue a summary judgment order that could substantially narrow the issues and you could consider if a

trial is ever necessary.

The U.S. debtors believe that they have good defenses. And as to some of the factual issues that Mr. Dean mentioned that he thinks are live and that demonstrate overlapping facts, as Mr. Dean himself said, discovery in this case just beginning. It's not clear whether any of those facts would be material or disputed farther down the line in this case.

So we think really that SNMP is engaged in a game of looking at hypotheticals when they suggest there is going to be reasons to withdraw the reference from these cases.

THE COURT: Judge Gross could enter an order on summary judgment with respect to the debtors but not with respect to Avaya. Correct?

MR. GURGEL: I don't think he could issue. Obviously, at summary judgment there wouldn't be any findings of fact. I guess as to Avaya, his conclusions of law I believe would have to be proposed conclusions of law at summary judgment. But he could certainly make final determinations regarding the U.S. debtors, including again with respect to his sale orders and, in effect, his rulings on SNMP's objections might substantially narrow the issues here.

With that, Your Honor, I would like to walk through some of SNMP's argument in a little bit more detail

and just to say why we think that they don't float.

On the issue of mandatory withdrawal, I think it is easier to start with that. SNMP briefs make essentially two arguments on mandatory withdrawal:

First, their brief argues, their opening brief argues that this case is going to require extraordinarily complex factual determinations -- and that is a quote from their brief -- including how, and when, 16 copyrights were exploited, who owned what software, and whether there were infringing derivative works. That is what they laid out in their brief.

But as Your Honor notes, the test for mandatory withdrawal, as Mr. Dean acknowledged, is whether there is a substantial material issue in a federal nonbankruptcy law, which we contend doesn't implicate the factual concerns that Mr. Dean has raised.

SNMP hasn't identified any interpretative issue. To the contrary, their brief purports to lay out in great detail what the legal standards are with the Copyright Act for resolving these questions that they raised.

They cited to one case in Texas where a court thought that withdrawal was warranted on a copyright case. You have mentioned that Judge Gross himself is overseeing copyright cases. And we pointed Your Honor to another of the cases, including two I believe from the Eastern District

of New York that indicate the Copyright Act is not unsettled, provides a clear roadmap that a bankruptcy can follow, and that both those cases declined to withdraw the reference on copyright acts.

We think the fact that the various cases that SNMP has cited in its papers demonstrate the kind of cases that do implicate those concerns. They cite cases like *Pacor* that involve novel questions of federal preemption and security laws, *Ravin* that involved substantial interpretation of regulatory statute resulting in intervention by the FDIC, and other cases involved tax law issues of first impression. Another involved the conflict between the environmental statute and the Bankruptcy code. Factors like those are absent here, Your Honor.

The other thing that they raise is a potential for a complication -- sorry, excuse me -- a complex application of law and fact with regard to damages in the bankruptcy case. Basically, the damages calculations here might be very complex. In their brief again, they purport to lay out all the various types of damages they sought under the Copyright Act. But, again, we think that shows that there aren't any real interpretive issues that implicate this Court's expertise.

Further, it's unclear that this case will ever reach the damages stage. We served -- among the discovery

that has happened so far, we've served interrogatories on SNMP asking them to explain what their damages theories are. And in the main, their response was it's too early. Well, wait until you see our expert reports and we will explain what our damages theories are.

So for SNMP to stand here in this argument and say this case is going to involve these complicated issues of damages, at this stage in discovery we don't even know what their damages theories are beyond sort of the recitation of these various factors that the Court will have to consider under the Copyright Act.

And, of course, we also believe that the debtors have good defenses as to SNMP claims as I indicated on why would we think the case might never reach the stage where many or all of those calculations were even necessary.

Finally, on the issue of mandatory withdrawal. Well, I have a couple more points on mandatory withdrawal.

We think SNMP is also incorrect in the way it frames this case as a complex copyright dispute for another reason. As I have just said, so far we don't think they teed up any complex issues of copyright law, and even the factual issues they teed up aren't supported by anything in the record. At best, are for some point off in the future.

Where there is concrete actual complexity in this case today again is because SNMP's claims are intertwined

with Judge Gross's rulings in the sale orders, his rulings on SNMP's objections, his oversight in the sales, which again include far more than just the sale to Avaya that forms the one set of noncore claims that are still left. SNMP's again seeking damages for Nortel for its sale of Genband, the sale to Ericsson. So we think there is a lot more here at its core than noncore.

Before I wrap up on mandatory withdrawal, I will touch on the two points that SNMP raised in its letter at the end of last week.

They claim, as Mr. Dean mentioned, that our joinder motion raises two issues of federal nonbankruptcy law that might implicate this Court's expertise. Of course, we disagree, and most particularly because the joinder motion is still pending before Judge Gross and won't be decided for at least several weeks.

To step back procedurally, SNMP is suggesting in this case that the U.S. debtors can be held jointly and severally liable for a portion of the profits, if any, that were received by the Nortel debtors in the bankruptcy sale and even profits not that were going to the U.S. debtors but any profits that went to the EMEA debtors in Europe for profits that went to the Canadian debtors in Canada.

We think that is wrong and the theory is wrong as a matter of law, but in order not to prejudice ourselves

we filed a joinder motion to ask that the EMEA debtors be brought into the U.S. proceeding. The Canada debtors, as you know, are being sued in Canada.

So with that background, the first question is whether the EMEA debtors can be held -- as SNMP has framed it, the first question is whether the EMEA debtors can be held jointly and severely viable for profits from SNMP even if the EMEA debtors are not a party to the case.

And so that question is perplexing because if the EMEA debtors are joined by Judge Gross in response to our joinder motion, then this question simply will be moot. The EMEA debtors will be a party to the case, and so the question whether they could be held liable if they're not a party won't ever be raised.

And even if the EMEA debtors are not joined, we are puzzled by that question because if they're not joined, the question of whether they can be held jointly and severally liable is still not raised by our motion. We're not seeking to hold EMEA liable in absentia and nor, to my knowledge, has SNMP filed any paperwork indicating that it intends to do so. We think that this question isn't raised at all by our motion really.

THE COURT: You are saying EMEA, is that right? E-M-E-A?

MR. GURGEL: E-M-E-A. Yes, Your Honor.

THE COURT: It's an abbreviation, correct?

MR. GURGEL: That's right. The EMEA debtors: European, Middle East, and Africa.

THE COURT REPORTER: Thank you.

MR. GURGEL: My apologies to the court reporter.

So the second question in granting to SNMP is whether the U.S. debtors can hold the EMEA debtors liable for a contribution claim even if the statute of limitations for a direct claim by SNMP is expired.

So this statute of limitations, too, is only going to be relevant if Judge Gross eventually decides to joint the EMEA debtors. And even if the EMEA debtors are joined, SNMP isn't asserting any direct claim against the EMEA debtors, so at most this issue raises a possible defense that the EMEA debtors might decide to raise at some point but it isn't live in this case right now.

So we think both of the requests raised in SNMP's letter last week really involve speculative matters. They turn at least in part to the outcome of the joinder motion. And, of course, we don't concede that really either question raises an unsettled question of law, much less one of federal and bankruptcy law.

THE COURT: So even if you are right about their impact on the mandatory withdrawal analysis, do I need to consider all of those factors related to your joinder motion

when I consider discretionary withdrawal? The suggestion today at least is it's going to go right to the heart of what a trial ultimately in front of me is going to look like. So maybe that is a point in favor of permissive withdrawal so that I can resolve that for myself.

MR. GURGEL: Well, Your Honor, first, I'd certainly agree that Your Honor is entitled to consider the entire factual context of the case in so far as the *Pruitt* factors.

I don't really see how this fits in. Again, I think that it's speculative as to whether a trial of facts is ever going to be necessary in this matter.

And I also think that Judge Gross -- I think maybe Mr. Dean suggested that Your Honor might even want to rule on the motion. I think that, again, Judge Gross is the one who has overseen this proceeding, who understands the implications perhaps of joining EMEA in the context of a larger bankruptcy dispute between the Nortel estates. I think he is in the best position to decide this.

So, again, I think that they really raised a speculative issue. I don't think that the joinder in addition to the defendant is something that, even if Your Honor would take notice of it, would substantially tilt the argument at all in favor of withdrawal of the reference.

So, Your Honor, on permissive withdrawal, I

think it is helpful to walk through the factors. And as we have been focusing on, as Mr. Dean focused on, we have really kind of two buckets of claims against the U.S. debtors. We have the sale-based claims that go to the transfers of assets by U.S. debtors, the EMEA debtors, and the Canada debtors that expires, and you have what I will call the use claims which are in the postpetition period from the petition date until the sales that the debtors were allegedly engaged in infringing these alleged products of SNMP. Again, the U.S. debtors, the Canadian debtors, and the EMEA debtors.

On the sales claims, we cited a number of cases where the District Court has decided where a Bankruptcy Court has substantial familiarity with the disputed issue and the relevant facts, the reference should remain in the Bankruptcy Court.

And one District Court in particular, the *Langenkamp* opinion that we cited in our brief at page 11, noted the Bankruptcy Court had previously ruled on objections in that case that were similar to the claims that were filed in the adversary decision, and we think that applies with great force here.

As I mentioned at the outset, Mr. Dean has suggested that the Court's sale orders, his rulings on SNMP's rejections are somehow not relevant. We don't

see how that can possibly be true given the complaint specifically alleges that we violated the sale orders and given that we believe Judge Gross's various rulings give the debtors good defenses to SNMP's claims as well as to the amount of damages that can possibly be attributed or profits that can be attributed to any SNMP software.

As to the use claims, and I mentioned this in my leadoff as well, Your Honor, these use claims that relate to the postpetition period are basically extensions of prepetition proofs of claims that were filed in the Bankruptcy Court. And those claims are the subject of a separate contested matter before Judge Gross and allege essentially the exact same postpetition conduct claims that SNMP is now trying to withdraw. So these claims as well, the efficient thing to do is to keep them before the Bankruptcy Court that has already gotten prepetition claims before it.

THE COURT: So regardless of what I do on the motion, the prepetition claims will stay with Judge Gross.

MR. GURGEL: I think SNMP has suggested, Your Honor, in a footnote in passing that Your Honor could sua sponte withdraw the reference on the prepetition claims as well. We don't think that has been properly briefed.

It really just heightens our concern here with regard to kind of the balance of core versus noncore issues

for the reasons that I have mentioned, and we already think that the core issues would predominant inasmuch as I said a couple times, SNMP's claims against the debtors implicate every sale that they have made in their complaint, Genband, Ericsson, et cetera, whereas the noncore claims are simply one sale to Avaya.

And to the extent that SNMP is now suggesting Your Honor could also withdraw prepetition core bankruptcy claims from the Bankruptcy Court, that just heightens our concern that the tail is being used to wag the dog here and that the noncore claims are being used as a lever to extract the core claims from the Court that has got the most familiarity with them and that would ordinarily be expected to rule on these types of claims in the court of allowance and disallowance of claims against the estate.

We also do think, notwithstanding what SNMP said, that efficiency and economy also support keeping the sale of claims and used claims in the Bankruptcy Court because of the parallel claims that SNMP has filed in the Canadian Court. And I won't repeat but I would say there has already been substantial coordination certainly between the parties on discovery.

The Bankruptcy Court and the Canadian Court have coordinated extensively in the past, including during the allocation trial last year, that issued an opinion as to

essentially which debtors were eligible to receive which portions of the bankruptcy business line sales that SNMP is now claiming.

While those allocations decisions are on appeal, the Court certainly has some background that will be helpful with respect to considering SNMP's claims, for example, that the U.S. debtors can be held jointly and severally liable for alleged profits that went to the Canadian debtor or the Canadian debtors. We think that, in other words, that SNMP claims really do implicate the Court's experience in the allocation proceedings. As Mr. Dean mentioned, Judge Gross has entered a scheduling order in an effort to kind of keep the proceedings as closely together as possible.

To address a couple of SNMP's arguments, Your Honor, SNMP I think has raised three main arguments as to why it would be more efficient to skip the Bankruptcy Court and take the case away from that Court that is most familiar with the claims.

The first is this idea only this Court can enter final orders and judgments on all the claims in the adversary proceedings. I think Your Honor actually addressed this recently last December in another adversary proceedings, *Longview Power*, where the same argument was raised and that only the District Court could enter final order and judgments, and Your Honor commented from your

experience with Magistrates that it's been your experience that not withstanding what you might have, you might not be able to skip a step as SNMP wants to do. It's often the case that no objections or only limited objections are taken from a Report and Recommendation. And the same thing could apply from the Order from the Bankruptcy Court. In that context, there may be substantial efficiency gained again from leaving the Court with the case that is most familiar with it, not withstanding this Court -- or I should say even if Your Honor were to find that only you can enter a final orders and judgments on all the claims.

And SNMP also brings up the related point of its purported jury trial right as to Avaya. I think, again, that issue was also live with *Longview Power*. And, again, the takeaway there was that while a jury trial was possible at some point, the proceeding might never get there, and so it would be premature to withdraw the reference on that basis.

SNMP had cited various cases in its brief, and I think they cited two of them to you during their argument, the *NDEP* and *Uni Marts* cases. And what is interesting about both those cases which talked, according to SNMP's brief, about automatic reference for a jury trial, both of those cases involve exclusively noncore claims which doesn't get mentioned in SNMP's brief.

SNMP also cited a few cases suggesting that jury trial was a reason to immediately withdraw the reference. And those were cited again on the final page of their reply brief.

What is interesting about three of those cases, I think they recited the *Uni Marts* and cited three more cases, literally the same sentence appears in each of those three other cases, which said in each case the parties existing withdrawal of the reference offered no reason why the case should remain with the Bankruptcy Court.

THE COURT: So where is that quote exactly?

MR. GURGEL: I might not quote it exactly but an identical sentence appears in each case, and we think we have given substantial reasons here why even if Your Honor were to find a jury trial right, it wouldn't require -- it wouldn't be efficient to immediately withdraw now.

We also think that if you look at the history of this case, that is another reason to think that the jury trial might be speculative. When this case began, it was filed not only against Avaya among the nondebtor defendants, but also against Radware, Genband, Performance Techs, and a few other affiliates. And as Mr. Dean indicated, all those non-debtor affiliates are now gone.

So I'm probably understating that it would be a shame, to say at least, if the reference were withdrawn now

on the basis of purported jury trial rights for Avaya which is the only defendant, the only non-debtor defendant left standing in this case.

THE COURT: I did wonder that. Let's just say I withdrew the reference and then Avaya disappears. Maybe there is a settlement, for instance, and I'm left just at that point I guess with core claims against the debtors. Can I withdraw the reference sua sponte at that point and send you all back to Judge Gross or do I have your case at that point?

MR. GURGEL: Standing here today, Your Honor, I'm actually not sure. Let's assume that you could do that at that stage. I think that is going to the efficiency question, would it be no harm/no foul.

And I think that at that point, probably the case would have been taken from the Bankruptcy Court for some period of time. Again, you have to recalibrate and you are shifting proceedings back to the another court or the court that had the most familiarity with the core claims could have kept them and was prepared and ready to move them forward.

There is a second argument that SNMP raises I think in their brief that relies on the case called *Appleseed's*. And this is the issue that Mr. Dean raised about, because you have core and noncore claims in the case, there is the

possibility that you would have different standards of review applying to a single fact that was relevant to both the core and the noncore claims. And I think that that argument also did not prevail on *Longview Power* because while it be a concern, it could also turn out to be a hypothetical problem.

The overlapping fact that SNMP identifies in its brief relates to what SNMP sought or was transferred to Avaya and what Nortel products contain that software, but that issue is the subject of ongoing discovery and so it's hypothetical in that sense as well. As I mentioned before, when these sales occurred, there was knowledge that certain products contained SNMP software. There are schedules and lists that contain some of this information. So to cast this as an issue that is certainly to be a disputed issue of material facts I think at the very least is premature.

Again, I mentioned that on the overlap point, as I mentioned a couple times now, and not to repeat myself, I think it is an important point. Concerning the core and noncore claims, it is important to realize that to the extent there is any overlap, Avaya again is just one of many buyers that Nortel is being sued on. So really as to the sale-based claims, to the extent that there is any connection, the parallel, the overlap of the claims against Avaya just represents a subset of what is being alleged against the U.S. debtors. We think that is another reason

why it's premature to think that there will be such massive overlapping facts here that the reference needs to be withdrawn.

Finally, I guess, SNMP in its brief obviously relied on the idea -- or finally on the efficiency point, SNMP relied in its brief on the idea that there would be efficiency gains because it could consolidate this case with the Red License and Blue License case. SNMP has now said it is not going to consolidate this case with the Red License case.

Furthermore, if it were to, then I think Mr. Dean's comments about the possibility to have a trial before Your Honor, obviously, and the efficiency gained, if any, to be gained by having before this Court results of hearing the appeal and the sale orders would go away. So I'm not sure where that leaves them, but it's clear that don't get any efficiently gains from the Red License case, and I believe Mr. Dean said they have also agreed not to join the Blue License case. I could be wrong, and I'm sure he would correct me.

Your Honor, I will try to cover the other facts more quickly. I think the efficiency is the hardest to get through. I think on expedition, it would really go to efficiency. And I would add Judge Gross has now twice expressed his concern that withdrawal of the reference is

going to delay the resolution of the debtors' bankruptcy cases here.

Mr. Dean I think argued it is all kind of irrelevant because we have these appeals going and it's going to be a long time before the cases are resolved anyway.

I would submit that that is not a reason to delay the resolution of the remaining claims against the debtors. As the allocation decisions currently stand, the allocations to each estate turn on the amount allowed against the estate. So the few remaining outstanding creditor claims out there really are one of the last impediments to the conclusion of the debtors' bankruptcy cases.

THE COURT: What about the suggest then that the schedule Judge Gross evidently has in mind for this adversary proceeding is not going to hold and that you all already are behind what he envisioned?

MR. GURGEL: Well, I think a couple things there, Your Honor. I think just to take a section with one remark that Mr. Dean made. He indicated that they hadn't even gotten information they needed for their expert reports yet. I think that is in part because SNMP served its document requests on us just two weeks ago.

I think more broadly not to quibble, I do

understand that, I don't want to speak for other parties, that there may be plans and there is a plan to move for a schedule extension, whether Your Honor withdraws here or before Judge Gross. And I don't think that any proposal -- no proposal has actually been submitted to the Bankruptcy Court yet. And the schedule won't hold. We could be talking about a shift of, I don't know, a couple months, maybe more than that. But I think it is speculative to say that that renders the expedition concern irrelevant.

Certainly, discovery has proceeded at apace in Canada, a substantial amount of discovery was taken up there. That discovery has been shared with the U.S. debtors in this proceeding. And at least in the past, SNMP has expressed its desire to minimize the need for duplicative overlapping discovery. So we do think it is important that things continue apace in the U.S. Court and to keep up with Canada to the greatest extent possible.

On uniform administration of the bankruptcy laws, Your Honor, I'll just say that the arguments in SNMP's brief that it's not an issue because uniform administration of the bankruptcy laws aren't implicated by these nonbankruptcy law claims, Your Honor pointed out in *Longview Power*, that was a case that involved California state law claims, but you also have to be concerned about the uniform administration of the bankruptcy proceedings.

Again, here where you have parallel claims in Canada, you have the Bankruptcy Court on sale orders that are implemented, we think that that factor certainly weighs in our favor.

I think the last two things I need to mention is forum shopping, and a jury trial. I hope I'm not pressing too close on time.

THE COURT: There is about five minutes left, and I do want to talk to Avaya briefly so use a couple minutes.

MR. GURGEL: Okay. Sure.

So one of our principle concerns, as I have said, the noncore claims against Avaya, is SNMP is attempting to use them it as a lever or a bootstrap for withdrawal of more substantial core claims from the Bankruptcy Court where they belong and SNMP's mantra has been this has always been about one, just having claimed in one forum, and the plan has always been to get them to the District Court eventually.

First, we think the premise is flawed because there is no one perfect forum in this case. The claims against the Canadian debtors are now being heard in the Canadian Court that oversaw the bankruptcy sales, just as we assert that the claims against the U.S. debtors should be heard in the U.S. Court, they oversaw those sales, which is the Bankruptcy Court.

We think that SNMP's one forum premise is also

flawed. We touched on this in response to Your Honor's question a little bit earlier that SNMP has a right to have all the claims heard in a single forum.

And SNMP says that, at least they made a new argument today about what they could have done, but when asked this question by Judge Gross about two months ago, SNMP acknowledged that the reason they filed all the claims in the Bankruptcy Court was because they were worried that a motion to withdraw just the core claims would not have worked in sum and substance.

We think that is essentially tantamount to an admission this is about forum shopping, that the goal to filing noncore claims with the debtors is to strengthen the eventual motion to withdraw.

I'm not suggesting anything any nefarious about that. But in litigation, the choices a party makes have to count, and forum shopping is a fact that *Pruitt* directs courts to guard against in considering these types of motions.

Lastly, Your Honor, I'll talk a little bit about the jury trial right.

Again, we don't think that it's a basis for withdrawal at this time regardless of what Your Honor defined, but we are maintaining our position that SNMP has waived any jury trial rights it might have had as to noncore claims against Avaya both by filing in the Bankruptcy Court

and by its postpetition conduct.

We have cited the case law to the effect that a motion to withdraw the reference has to be made promptly in order to preserve the jury trial right. SNMP says it's been our intention all along but we couldn't do it for this reason or that reason.

First, on the letter agreement, Your Honor. And I don't have the text letter agreement in front of me, but the sentence that Mr. Dean referenced where the U.S. debtors, Canadian debtors promised not to raise a timeliness argument specifically indicate they agreed not to raise that argument "because of the mediation." The mediation was never a bar to SNMP's ability to withdraw the reference as to various non-debtor defendants.

THE COURT: The claim, it was with respect to the debtors.

MR. GURGEL: Yes, Your Honor, it was. But this is why we don't think the letter agreement stands as a bar to our ability to raise these claims.

We're not arguing that SNMP unduly delayed moving to withdraw the references against the debtors. But we are objecting to the fact that they were on notice that they had a purported basis to withdraw the reference. They indicated in their reply brief on the motion to -- in the Radware motion to dismiss in mid 2013 that they "may decide

to withdraw the reference." And there was a colloquy with Judge Gross at the hearing about withdrawing the reference and still the reference wasn't withdrawn. So they could have withdrawn as to the non-debtors at any time.

THE COURT: All right. I am going to have to stop you there. Just one more question.

I have this stipulation in front of me. Did the debtors have any objection to me signing it?

MR. GURGEL: I don't think we object. No, Your Honor. Although to clarify, I think at one point early on in its brief, SNMP said that, well, it seemed to suggest that Avaya joined or was supporting a motion to withdraw, and that is not certainly our understanding.

THE COURT: All right. Well, I'm going to get Avaya up here just now. So thank you.

MR. GURGEL: Okay. I wanted to talk about *Billing* for a moment, if Your Honor was interested, but I understand.

THE COURT: I'm sorry. We've already gone over the time.

MR. GURGEL: Thank you very much, Your Honor.

THE COURT: Let me give a couple minutes to Avaya. And I guess you could start by clarifying, do you have a position on whether I should withdraw?

MS. PARLIN: At this stage of the game, Your

Honor, we would prefer that if the case is going to be withdrawn as to Avaya that it be done now and that the case proceed in District Court. We think that it would make more sense from the schedule perspective and just from an overall oversight perspective that the case proceed in the District Court.

It probably should have been filed here to begin with against Avaya. Avaya was brought along into the Bankruptcy Court, I think. It's still not really clear to me why the case was originally filed against Avaya but in the Bankruptcy Court. But to the extent that it's going to end up here at some point or another, we would rather it end up here now and just go along that way.

THE COURT: Now, there has been back and forth on the possibility of a partial withdrawal. Does Avaya have a view? If you think you should essentially be here, do you have any view on where the debtor should be or is that not of a concern to you?

MS. PARLIN: We don't have any problem with the debtor staying in the Bankruptcy Court.

THE COURT: Okay.

MS. PARLIN: We're not taking a position on that.

THE COURT: And the stipulation, you still want me to sign it; correct?

MS. PARLIN: Yes, Your Honor.

THE COURT: Those are my questions for you. Is there anything else you want to add?

MS. PARLIN: I simply would say that while it isn't clear what is going to happen going forward, whether there will be a trial or not be a trial or how that will all play out, I do think it makes more sense that if we're going to end up here, if it does happen that we'll end up here, that we start here. And that is from our -- while our client was perfectly content to stay in the Bankruptcy Court, if it wasn't going to stay in the court throughout, if it's not going to happen, it would prefer to be in a place where an ultimate judgment will be entered.

THE COURT: And if I were not to do that, how would your client be prejudiced?

MS. PARLIN: In part because then we'll be held hostage to a schedule that is directed towards the benefit of the debtors. Frankly, we understand that the debtors have their own issues, and we're not saying that they shouldn't have their own issues. That's the debtors interests, and we understand those interests.

But this is a very serious case against Avaya. I think that you heard Mr. Dean say that their damages claims are upwards of $100 million against Avaya. That is a very large claim against our client. We take this very seriously, and we think that the litigation should be given, the litigants

and Avaya in particular, which is often treated as sort of the tail wagging the tail here, not wagging the dog but literally just the tail, to have a full and fair opportunity to litigate the case, which means to conduct discovery.

When we first got into this, we thought maybe the discovery won't end up being so broad because frankly the plaintiffs didn't serve any. We served ours at the very beginning when Judge Gross issued his scheduling order, and the responses we got were sort of see the Red case which is the other cases before Judge Andrews. So we thought, well, maybe it won't be. But now it looks like it's going to be actually much broader than that.

And there is, as Mr. Dean suggested, there are a number of subpoenas that have been issued to other buyers of Nortel products that's going to broaden out the discovery. And we think that it will be brought, and as to Avaya it will be brought. So under the circumstances, we want a full and fair opportunity to litigate the matter.

THE COURT: And despite all of this view now, you did oppose the motion to withdraw when it was filed?

MS. PARLIN: Because we thought that we had a fair and reasonable basis to oppose it, and we were content to stay before Judge Gross if we would stay there for the full case, but sort of weighing all the possibilities and particularly -- we were before the Court in February, and

we made it very clear at that point that we didn't want to be held hostage to the debtors' schedule. We filed an objection to a scheduling motion that the debtors filed at that time. We thought that there would be a reasonable schedule entered into the case with respect to Avaya.

THE COURT: Is there anything else?

MS. PARLIN: No.

THE COURT: All right. Thank you. We'll give the moving parties another couple minutes for rebuttal.

MR. DEAN: Thank you, Your Honor. Just a couple quick points.

Mr. Gurgel mentioned the coordination with the Canadian Court but then he only talked about the coordination between the parties in the case and the coordination between the Canadian debtors and the U.S. debtors, and if the references are withdrawn there would be nothing to stop the parties from continuing to coordinate. He mentioned nothing about coordination with the Court, however.

With respect to the comments that he alleges that I made at the Bankruptcy Court hearing that filing a complaint against Avaya here first wouldn't have worked, what I was referring to was Judge Gross asked -- my recollection of it, I don't have the transcript here, but my recollection is he asked me why don't you just sue Avaya in District Court, go after the Canadian debtors in Canada, go

after the U.S. debtors? Why don't you just do that? I said I wouldn't have been able to -- I don't think I would have been able to bring all the parties together in a single lawsuit unless I commenced the lawsuit in once place. And the only way I could have done that, based on the agreement we reached with the Canadian debtors, was to start the case in Bankruptcy Court, and that is why we did what we did.

Mr. Gurgel alleges that I made this new argument today regarding 28 U.S.C. 959(a). Two points on that.

No. 1, this was an argument that I expressly made at the hearing in front of Judge Gross, so he fully understands that we have this position.

No. 2, the reason I raised it for the first time in the briefs before this Court is because in the August 24th letter was the very first time that the debtors advocated for a partial withdrawal of the reference. So the issue never became relevant until they raised partial withdrawal of the reference in their letter, so that is why the issue was coming up for the first time today.

With respect to the sale hearing issue. This isn't about the assignment of the license agreements. What we allege is that they didn't -- that Nortel actually transferred our source code, our software, our property, not the license agreements themselves to asset buyers. That is the premise of the case. Whether the license agreements

were transferred or assumed and assigned in the bankruptcy is not an issue in this case at all, and Mr. Gurgel simply either doesn't understand that or he wants the Court to think this is something that Judge Gross said at the sale hearing about the assignment of the license agreement.

There is no dispute that the license agreements were not assigned and could not be assigned under the Bankruptcy Code without express authority from us. But this is about transferring our software, not the license agreements itself.

With respect to summary judgment issue, Your Honor, if Judge Gross were to decide summary judgment on these claims and you denied withdrawal or you said we have a right to withdraw the reference but you are going to keep the case there until trial, the way this is going to work is the judge is going to rule on dispositive motions and he is going to be able to issue final orders with respect to the same issues that he can only issue proposed findings and conclusions as to the issues related to Avaya.

Some of these issues may be the same. So the debtor would be in a position of having to appeal a summary judgment order and Avaya would be in a position of having to object to proposed findings and conclusions. I believe that would create a chaotic nightmare with respect to any ruling on a motion for summary judgment; and I think the most

efficient thing to do is just to take the case now to avoid that.

With respect to the joinder motion, Mr. Gurgel misstates the issues that we presented. He stated that our issues of first impression were whether the EMEA, whether we could assert damages against the EMEA debtors if they were a party, and that is the reason why the outcome of that motion is determinative of the issue of first impression, but that is not what we say in our letter to the Court.

Our issue of first impression is whether we can assert damages against the U.S. debtors, not the EMEA debtors, depending on whether or not the EMEA debtors are a part to the lawsuit and could be found to be a practical partner. So that is an entirely a different proposition and one that is does not hinge on the outcome of that motion but one that was raised based on that motion being filed.

A couple more things. The proofs of claim. The statute specifically says that the Court may withdraw the reference as to any matter on its own motion or motion by the parties. If the Court decides to withdraw the reference of this adversary proceeding, the proofs of claim are just staggering right now. There is nothing happening with the proofs of claims. Nothing is happening.

So we propose a couple things.

One, we think it is appropriate for the Court

to just take the proofs of claims if they're going to take the litigation because there is conduct that happened prepetition reflected in those proofs of claim that continued into the prepetition post-sale period. Our first theory of the case against the debtors was that they were using our software outside the scope of the license. It's just for the prepetition portion of that conduct. So we do think it would be appropriate to take that case up. And I think the debtors should agree. That if they're really so concerned about this, then they should agree to allow the reference to be withdrawn as to the proofs of claim as well if you are going to take the other case up because that way we won't have to have litigation on proof of claims in front of Judge Gross.

But, alternatively, as we said in the reply brief, we will stipulate right now to agree to hold those proofs of claim in abeyance pending a trial, and then we won't have to do any work on the proof of claim until it is decided, and then it will resolve itself through the trial in this case.

So there are ways to deal with the proof of claim. I just proposed three, and I think either one of those would be appropriate in this case.

One other point, Your Honor. This is not the tail wagging the dog. As I said at the beginning, we think we have $100 million plus damages against Avaya and Nortel.

This is not like we have a $10 claim against Avaya and we filed a lawsuit against Avaya and added them to this lawsuit to bring a nominal defendant up. So I think the whole tail wagging the dog concept or the whole bootstrapping argument rings hollow.

Then the one point I want to address finally is the issue that Your Honor raised about, well, what if there is an settlement against Avaya?

If the Court finds in its decision on this motion that we don't have an independent basis to withdraw the reference of the entire case even though this is a copyright case and mandatory withdrawal of reference isn't appropriate, and the sole basis for us to be able to do this is based on the jury trial rights as to Avaya, I believe that the Court could send the case back down, and we wouldn't object to that if the Court finds the only reason we have the case here is because of Avaya. We think that mandatory withdrawal of the reference would require it anyway and all the other factors, but if you hold that the jury trial right is the sole reason why you are withdrawing the reference to the entire case right now, we would have no problem. And I don't think there is anything in the statute that would prohibit you from sending the case back down if we settled with Avaya, which frankly is simply just not going to happen, we don't think.

Thank you, Your Honor.

THE COURT: Okay. Thank you. I thank all counsel for helpful argument, and we'll take the motion under advisement. We will be in recess.

(Hearing ends at 11:56 a.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Brian P. Gaffigan
Official Court Reporter
U.S. District Court